

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

WESTERN SUGAR COOPERATIVE, INC.

and

Case 27-CA-21421

DONNA MARIE HARPER, an Individual

L. Joseph Ferrara, Esq., for the General Counsel.
Chad E. Orvis, Esq., *Mountain States Employers Council, Inc.*,
of Denver, Colorado, for the Respondent.
Donna Marie Harper, of Brush, Colorado, Pro se.

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Fort Morgan, Colorado, on June 24, 2010. The captioned charge was filed on November 24, 2009, by Donna Marie Harper, an individual (the Charging Party or Harper). On April 27, 2010, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Western Sugar Cooperative, Inc. (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a Colorado corporation with an office and place of business in Fort Morgan, Colorado, where it engaged in the extraction and processing of sugar. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$5000 directly from points outside the State of Colorado. It is admitted, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

I find that Teamsters Local 455 (the Union) is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

The principal issue in this proceeding is whether the Respondent has violated Section 8(a)(1) and (3) of the Act by terminating the Charging Party for contacting the Union, and telling the Charging Party that she was being terminated for contacting the Union.

B. Facts

The Union represents certain employees of the Respondent. The current collective-bargaining agreement between the parties extends from June 1, 2006, to May 31, 2011.

Harper was interviewed and hired by Office Manager Cheryl Burdette as a full-time (40 hours per week) seasonal employee. Harper began working for the Respondent on September 16, 2009.¹ The seasonal nature of Harper's employment was dictated by the Respondent's "campaign" or harvesting season, extending from about mid-September until the first of March of each year. Harper's job duties were twofold: she was to work 3 days, 10 hours per day, in the scale house, as a press pulp scale operator, weighing trucks that delivered sugar beets or pulp to the facility; and she was to work one 10-hour day each week cleaning the offices (vacuuming, dusting, cleaning off desks) of the Respondent's two-story facility.

Harper was hired as the junior press pulp scale operator. Dorothy Timpe, also a seasonal employee, was the senior press pulp scale operator. During the harvesting season the scale operates 7 days a week, 10 hours a day. Timpe worked 4 days per week at this position and, as noted, Harper was to work 3 days per week at this job and 1 day per week performing her office cleaning duties. The two employees worked on different days of the week and did not work together. Timpe, before she became the senior press pulp scale operator, had been the junior operator and had performed the same dual job duties as Harper was hired to perform. Cleaning the offices was a less desirable and more physically demanding job than operating the scale and keeping a record of truck weights.

During the interview process, Harper advised Burdette that, upon the advice of Harper's doctor, she was not to lift items over 30 pounds because of a neck injury she had sustained. This did not seem to be a problem as the pulp scale operator job involved no lifting, and the office-cleaning job component would require Harper to carry a vacuum cleaner, weighing less than 30 pounds, up or down the stairs of the two-story office facility. However, shortly after Harper began performing her office cleaning duties she began having difficulty not only because of having to carry the vacuum cleaner but also as a result of the physical activity associated with cleaning duties in general. On October 18, she left the following note for Burdette:

Cheryl

¹ All dates or time periods hereinafter are within 2009, unless otherwise specified.

I regret to inform you my neck cannot handle the cleaning. I am back to taking pain medication.

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I am willing to try to clean every other Monday to flip/flop with Dorothy; I realize she has medical limitation but I do too.

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I wish I could do the scale Monday-Sunday. I really like it.

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If flip/flopping is not an option, do you have any typing or computer jobs for me or any other sedentry [sic] positions.

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Burdette testified that "flip/flopping" was not a viable option: it had always been understood that the senior person would not have to clean, and it would have been inappropriate and unfair to require Timpe to clean. Nor did Burdette have any sedentary office work for Harper. Burdette contacted Harper by phone and told her this. She also explained the Respondent did not want to jeopardize her health by requiring her to perform work she was incapable of performing. Harper did not clean on the following day, October 19, as scheduled. Then, on about October 22, Burdette received another note from Harper. In this note, Harper asked if she could split the office cleaning duties and work 5 hours on 2 consecutive days, as "10 hours is too much time to be cleaning in one day."

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Burdette testified that even if Harper had been physically able to clean on a split-shift basis, as Harper had requested, this would not have been an option as the collective-bargaining agreement between the Respondent and Union prohibited split shifts.² Further, Burdette told Harper she did not feel comfortable giving her any further cleaning duties without some kind of doctor's note. On October 28, Harper brought the following note from her doctor:

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Donna Harper has a permanent medical condition and requires some specific work limitations. She is able to lift 0-10 pounds frequently, 15 pounds very infrequently. Any overhead activity or repetitive upper extremity activity is not recommended. She is unable to carry a vacuum cleaner, especially up a stairway. Donna is physically capable of performing cleaning chores for five hours consistently but not for a ten-hour stretch. If you need further information regarding work restrictions for Ms. Harper please feel free to contact my office.

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Burdette spoke with Harper and told her she was a very good employee. Burdette explained that that "in no way" would she feel comfortable giving Harper cleaning duties. She told Harper that she would talk to supervisors and other managers to see if there was some other employee who could be given the cleaning duties, but that if she was unable to find some current employee to do the cleaning she would have to let Harper go.

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Burdette testified that she did speak to supervisors and managers and was unable to find a current employee to perform the work. Further, it would not have been feasible to attempt

² Art. 3 (C), Work Hours, of the collective-bargaining agreement states: "No split shifts will be scheduled."

to hire a new employee for a 1-day per week job. During the interim period while Harper was performing only her pulp scale operator duties, Burdette and other supervisors were cleaning their own offices; however, they were all very busy during this time with other work and,
 5 according to Burdette, it became necessary to find a person who could fill both the pulp scale and office cleaning requirements of the position.

Harper attempted to enlist Timpe's help. She wrote a note to Timpe as follows:

10 I don't know how long I'm going to be working here. I'm only getting 30 hrs—I can't clean; my medical restrictions are stricter than what Cheryl [Burdette] wants them to be. Do you absolutely need to have 40 hours? I would really like to stay but I can't make it on 30 hours. House payment, Car payment etc. (Life is expensive) I just thought maybe you and I could work something out here. But if
 15 not its been good working with you. [Emphasis added.]

Harper testified that she had written the note based on a prior conversation with Timpe who said that she (Timpe) "didn't need her job, that it was just something for her to do." Then, after receiving the note, according to Harper, Timpe called her and "said that she [Timpe] would
 20 prefer to work . . . the 30 hours, and that I could have the 40 hours, and I asked her if it would be possible for her and I to get together and talk to Cheryl [Burdette] about that, and she said yes."

Timpe, however, testified that at no time did she call or even speak to Harper about switching positions. Nor had she ever advised Harper that she would rather work a 30-hour
 25 week instead of a 40-hour week. Timpe testified as follows:

30 I have two horses to support. The only time I worked in the last several years has been at Western Sugar. So any money I get saved up has to last me. So there's no way I could do anything other than the 40 hours, and I have been with Western Sugar since 1986, and I didn't figure I needed to give up my hours to anybody else, and I never did talk to her [Harper] about that whatever.

Burdette testified that Timpe advised her of the foregoing note from Harper. Timpe, concerned that her 40-hour per week job was in jeopardy, told Burdette that she needed the 40
 35 hours. Burdette assured her that she was the senior employee and that she should not be concerned.

As the foregoing scenario was unfolding, Harper sought assistance from the Union by contacting Union Steward Greg Mares, an employee of the Respondent. Mares, called as a
 40 witness by the General Counsel, testified that Harper explained the situation, telling him that her hours of work had been reduced due to medical restrictions and that she needed more hours of work. Mares said he would contact Burdette about the matter. Mares testified that he told Harper, who had explained to him that she was working 30 hours per week but needed 40
 45 hours, to "take the 30 hours because you're not guaranteed 40 hours. I said just take the hours because they could actually let you go if you can't do the job."

Mares did speak with Burdette about the matter. When asked by the General Counsel to "guesstimate when that conversation may have occurred," Mares testified, "I don't know."
 50 However, he did recall that the conversation was in person and occurred after he and Burdette had concluded a previously scheduled meeting regarding another employee. He was not asked whether it was he or Burdette who initiated the conversation regarding Harper. During this

conversation, according to Mares, Burdette told him she had to get somebody in there to clean, and Mares agreed. His testimony is as follows:

5 What else can we do? She had a job, you know; as a Union rep, I said cool. If you can't do the job, you need to get someone who could. So we assessed it and said, well, between the two of us, well, she'd have to let her go. . . .³

10 Burdette testified that at about the end of October, having been unable to get a current employee to take over Harper's cleaning duties, she contacted Laurel Perth, an administrative assistant, and asked her to begin looking for Harper's replacement. Perth did find a potential replacement, Candice Talbert. Burdette, and apparently Perth, interviewed Talbert and offered her the job, but she refused the job because of the hourly wage was insufficient.⁴ Also, during the week of November 9, Burdette contacted Stuart Norrish, the Respondent's agriculturalist. 15 She asked Norrish if he had any current candidates who could fill Harper's position after the 4-r to 6-week harvest campaign season had ended for certain seasonal agricultural workers under Norrish's supervision. On about November 15 or 16, Norrish advised her he had an employee, Vicki Hardigee, who was interested and would be applying for the position.⁵ At that point Burdette made the decision to dismiss Harper.

20 However, before she did so she wanted to discuss the matter with the Union. Burdette, when asked whether it was a common practice to talk to the Union before dismissing employees, testified: "Absolutely, yes. Every opportunity—we involve the Union in everything."⁶ She spoke with Mares on November 18, after a scheduled meeting regarding another matter. 25 Prior to this date she had not spoken to anyone from the Union about Harper's situation. She told Mares that she had restricted Harper to 30 hours per week because of her medical restrictions, and was unable to get anyone to cover her cleaning duties. She told Mares that she had no other options, and would have to dismiss Harper.

30 Burdette called Harper at home on the next morning, November 19, and explained that she was being dismissed as follows:

35 . . . told her that I had tried to find people, I tried to do everything I could to keep her employed with us, told her that she was a very good employee, but that I just could not do that, that I needed someone to clean the offices, and part of her job was to do that, and she's not able to do that. So I told her I had to release you [sic] and get someone else.

40 ³ Mares testified that his aforementioned conversation with Harper occurred after he spoke with Burdette about the matter. If this is correct, then Mares simply did not want to tell Harper that he agreed with Burdette and that Harper was to be dismissed.

45 ⁴ Perth corroborated the testimony of Burdette. Perth testified that Talbert was offered the job and wanted some time to talk with her husband about it. Then, sometime during the week of November 16, Talbert advised Perth she would not be taking the position.

⁵ Norrish corroborated the testimony of Burdette. Norrish testified Hardigee's last day working for him was November 14. Perth testified that Hardigee was hired the week of November 16 to replace Harper, and began working on November 20.

50 ⁶ Mares corroborated Burdette's testimony as follows: "In all the years we've worked together, we've never had a problem. In the past [Burdette], was even pulling for us, you know; if you're not sure about this, go to the Union . . . I'll give you [Union Business Agent] Bob Adams' number. . . ."

Harper became upset during the conversation. Burdette told her this is what she had to do and said, "Now, if you don't believe this is right, then you need to go to the Union." Burdette testified that if employees question something, "I always refer them to the Union . . . it's there for them. So we encourage them to go to the Union."

Later that day, Harper and her boyfriend, Rodney Hardy, then an employee of the Respondent, came to the office to pick up Harper's paycheck. Burdette told Harper that she was a good employee, that Burdette appreciated her work, and that if there was a 40-hour position open in press pulp Burdette would love to have her back. There was discussion about what Harper's termination slip would say. Harper and Hardy wanted the slip to reflect that Harper had been fired—that is, discharged for some work infraction. Burdette disagreed, stating that if Harper had been discharged for cause then she would not be able to be rehired; therefore, Burdette wanted to simply state the correct reason, namely, that Harper was dismissed for inability to perform the job due to medical restrictions.⁷ Because of the disagreement regarding the wording of the layoff slip, Burdette suggested she, Burdette, would call Bob Adams, the Union's business agent, to find out the best way to handle the situation.

Harper testified that on the morning of November 19, Burdette called her at home and, in an angry tone of voice, said, "[Y]ou and I talked about you being happy with the 30 hours and you contacted the Union." Harper interrupted her, disagreeing, and stated that she had never said she was happy with the 30 hours. Then Burdette said, "You contacted the Union, and that is why I'm firing you." Harper said Burdette could not fire her for that, and Burdette replied, "I just did," and hung up. Later that afternoon, Harper and Hardy went to the office together to pick up Harper's paycheck. There was discussion about whether Harper's release from employment should be documented as a "willful termination" or a "discharge." Harper wanted the slip to say that she had been fired or discharged because, in fact, she was not "willfully" leaving the Respondent's employment. During the conversation, according to Harper, Burdette again said, "[I]f I hadn't contacted the Union, this would not be happening."

Hardy worked for the Respondent during the 2009-2010 campaign season, but was not working for the Respondent at the time he testified in this matter. Hardy testified that Harper had initially told him she had been fired for contacting the Union. Then the two of them went to the Respondent's office. In the office, Burdette said, "[W]ell, Donna, if you wouldn't have contacted the Union, this never would have happened." In a statement dated December 9, given to the Union during the Union's investigation of Harper's grievance, Hardy states that Burdette also said, "[T]hat if they get another scale position she would give her a job back for she liked Donnas [sic] work and was going to put she quit willfully."⁸

⁷ The "Time Order" slip states that Harper was a "Voluntary Quit" for "Inability to do job." Under the heading "Other reasons or Explanation," is the statement "Inability to do job per medical restrictions."

⁸ The Union did not take Harper's grievance to arbitration because, according to Union Business Agent Robert Adams, there was no violation of the labor agreement. And, according to Union Steward Mares, "[W]e felt she was let go because she couldn't do the job," rather than because she had contacted the Union. Adams testified that Union Steward Mares told him after talking with Burdette "that he [Mares] felt that the company was trying to make every accommodation they could for Donna [Harper] to keep her working." The Union had no objection to accommodating Harper's medical restrictions by permitting her to work a 30-hour workweek, even though, according to Adams, it was preferred that all employees work a 40-hour workweek.

Burdette testified that at no time either during the phone conversation with Harper, or during the conversation that afternoon with Harper and her boyfriend, did she ever make a statement to the effect that Harper would not have been terminated if she had not gone to the Union.

C. Analysis and Conclusions

The record is clear that Harper very much wanted to keep her 30-hour per week job as a pulp scale operator, and, in addition, despite her medical restrictions, needed to work an additional 10 hours per week in order to meet her expenses. To this end she explored various avenues with Burdette, with her coworker Timpe, and with the Union, to no avail. Similarly, Burdette, who was well satisfied with Harper's work but very reluctant to have her perform any physical duties, was unable to find a way to retain Harper. Harper was understandably disappointed and upset when Burdette dismissed her on November 19.

The overwhelming weight of the record evidence supports, and I credit, the testimony of Burdette. In particular, there simply is no reason why Burdette, upon dismissing Harper, would have made the statements attributed to her by Harper and Hardy. Insofar as the record shows, it was Burdette who approached Union Steward Mares about the Respondent's decision to dismiss Harper; and indeed, Mares not only agreed with the decision but, according to his testimony, seems to have been invited by Burdette to provide his input after Burdette explained the situation to him. Further, Mares' only credible recollection of when this conversation took place was that it occurred after a face-to-face meeting with Burdette regarding another matter. Burdette testified the meeting with Mares and discussion about Harper took place on November 18, at which time she had already decided to dismiss Harper because another applicant for the job was hired or about to be hired. I credit Burdette's testimony, and find that the first date she may have become aware that Harper had contacted the Union was on November 18, after she had made the decision to dismiss Harper.

Moreover, contrary to Harper's testimony, it is clear that Harper understood the 30-hour per week job was only temporary, and that well before November 19 she knew or strongly believed she would be dismissed. Thus, she knew her continued employment was dependent on whether Burdette could find a current employee to take over her cleaning duties; or, in the alternative, whether Harper would be successful in appealing to her coworker Timpe to reduce her hours and give them to Harper. Thus, in this context she wrote to Timpe, "But if not⁹ its been good working with you." I do not credit Harper's testimony that she wrote this because her economic circumstances were such that she would have to quit and find a 40-hour per week job with another employer. Clearly, working 30 hours per week would have been better than being unemployed; and she could have searched for a different job on her off days.

Finally, I credit Timpe, who was emphatic in testifying that she needed 40 hours' work each week and, contrary to Harper's testimony, stated she never indicated to Harper that she would have no objection to giving Harper her hours, and never spoke with Harper about the matter.

On the basis of the foregoing, I disbelieve Harper's testimony to the extent that it was contradicted by Burdette and Timpe. I find that Harper was dismissed for the reasons and under the circumstance described by Burdette. I further find that Burdette did not state to Harper and Hardy that if Harper had not gone to the Union she would not have been fired.

⁹ That is, if Timpe was not willing to reduce her hours.

Accordingly, for the foregoing reasons, I shall dismiss the complaint in its entirety.

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Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended ¹⁰

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ORDER

The complaint is dismissed in its entirety.

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Dated: Washington, D.C., September 29, 2010.

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Gerald A. Wacknov
Administrative Law Judge

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¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.